

THE HONORABLE JUDGE _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATIONAL LABOR RELATIONS BOARD ON BEHALF OF)	Civil No. _____
INTERNATIONAL ASSOCIATION OF MACHINISTS AND)	
AEROSPACE WORKERS, DISTRICT LODGE 751,)	NATIONAL LABOR
affiliated with INTERNATIONAL ASSOCIATION)	RELATIONS BOARD'S
OF MACHINISTS AND AEROSPACE WORKERS,)	APPLICATION FOR AN ORDER
)	TO SHOW CAUSE AND ORDER
)	REQUIRING COMPLIANCE
Applicant,)	WITH BOARD SUBPOENA
)	<i>DUCES TECUM</i> B-648186
v.)	
)	ORAL ARGUMENT REQUESTED
THE BOEING COMPANY,)	
)	NOTE ON MOTION CALENDAR:
Respondent.)	DECEMBER 16, 2011

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Application for Enforcement
of Board Subpoena B-648186
Civil No. _____

NATIONAL LABOR RELATIONS BOARD
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1 The National Labor Relations Board (the "NLRB" or the "Board"), an administrative agency
 2 of the Federal Government created pursuant to the National Labor Relations Act, as amended (the
 3 "Act"), 29 U.S.C. § 151 *et seq.*, applies to this Court pursuant to § 11(2) of the Act [29 U.S.C. §
 4 161(2)], for an order requiring Respondent The Boeing Company ("Respondent") to comply with
 5 subpoena *duces tecum* issued by the Board and duly served upon Respondent by International
 6 Association of Machinists and Aerospace Workers, District Lodge 751, affiliated with International
 7 Association of Machinists and Aerospace Workers, AFL-CIO (Charging Party), in the manner
 8 provided by law.

9 This Application is being filed concurrently with a second Application for an order requiring
 10 Respondent to comply with a similar subpoena *duces tecum* issued on behalf of the Acting General
 11 Counsel for the Board (the "Acting General Counsel") in the administrative proceeding. As the
 12 issues presented and interested parties involved in these two actions are identical, the Board will
 13 move to join these two actions.¹

14 The basic goal in both subpoena enforcement proceedings is to obtain from the Court an
 15 order that will permit the administrative proceeding to proceed with sufficient access to those
 16 Respondent's documents believed necessary to make a complete administrative case, but without
 17 causing undue harm to the Respondent by unnecessary release of its confidential information. That
 18 is, the Acting General Counsel the Charging Party each seek an order: (i) enforcing its respective
 19 Subpoena, as modified by the Administrative Law Judge, and (ii) requiring the Acting General

¹ While Section 11(2) of the NLRA, 29 U.S.C. 161(2), expressly grants district courts jurisdiction to enforce Board subpoenas, it limits that jurisdiction to cases brought "upon application by the Board." Thus, the NLRB is also filing the application on the relation of Charging Party to enforce its subpoena so as to ensure the Court's jurisdiction to enforce the two subpoenas, *Wilmut v. Doyle*, 403 F.2d 811, 814 (9th Cir. 1968), and to bring Charging Party into the proceedings. See, e.g., *NLRB, on the relation of IUOE v. Consolidated Vacuum Corp.*, 395 F.2d 416, 418 (2d Cir. 1968).

Counsel and the Charging Party to obey the Protective Order -- issued by the Board's Administrative Law Judge at Respondent's request -- limiting the parties' and Agency's use and disclosure of information deemed confidential.

In support of this Application, the Board respectfully declares and shows as follows:

Jurisdiction and Underlying Unfair Labor Practice Proceeding

1. This Court has jurisdiction of the subject matter of the proceeding and of Respondent by virtue of § 11(2) of the Act [29 U.S.C. § 161(2)] in that the inquiry underlying the issuance of the subpoena *duces tecum* is being carried out within this judicial district and Respondent transacts business within this judicial district, where it operates aircraft production facilities in different locations throughout the greater Seattle, Washington, area.

2. Pursuant to § 6 of the Act, 29 U.S.C. § 156, the Board has issued Rules and Regulations, Series 8, as amended 29 C.F.R. § 102 *et seq.* (the "Board's Rules"), governing the conduct of its operations.

3. Pursuant to the provisions of § 10(b) of the Act [29 U.S.C. 160(b)], there is currently pending before the Board an unfair labor practice hearing before Administrative Law Judge Clifford H. Anderson (the "Administrative Law Judge") arising from the issuance of an administrative complaint in Board Case 19-CA-32431 (the "Administrative Complaint"). A copy of the transcript of the pending administrative unfair labor practice hearing before the Administrative Law Judge is attached to this Application as Exhibit 1. Copies of the exhibits submitted by the Acting General Counsel, Charging Party, and Respondent at the pending administrative hearing are attached to this Application as Exhibits 2 through 7. (Complaint at Exhibit 2 at 000234 through 000246). The Administrative Complaint issued following the investigation of the underlying charge filed with the Region 19 office of the Board by Charging Party. (Exhibit 2 at 000249). Each of these documents

1 was prepared, filed, and served consistent with the requirements of § 10(b) of the Act [29 U.S.C. §
 2 160(b)], and of §§ 102.9 through 102.14 and 102.69 of the Board's Rules [29 C.F.R. §§ 102.9-
 3 102.14 and 102.69]. (Exhibit 2 at 000232-000233, 000247-000248). Respondent filed an answer to
 4 the Administrative Complaint denying that it violated the Act. (Exhibit 2 at 000221-000231).

5 4. The Administrative Complaint alleges that Respondent violated §§ 8(a)(1) and (3) of
 6 the Act, 29 U.S.C. §§ 158(a)(1) and (3), by: (1) making coercive statements to its employees that it
 7 would remove or had removed work from their bargaining units represented by the Charging Party
 8 because employees had previously struck Respondent, and threatening or impliedly threatening that
 9 their bargaining units would lose additional work in the event of future strikes; and (2) deciding to
 10 transfer a second 787 Dreamliner airplane assembly line (the "second line") and a sourcing supply
 11 program for the second line from their bargaining units represented by Charging Party to its non-
 12 union site in North Charleston, South Carolina, or to subcontractors because employees from
 13 Charging Party-represented bargaining units had previously engaged in strikes against
 14 Respondent.²

15 5 On June 14, 2011, Respondent moved to dismiss the Administrative Complaint for
 16 failure to state a claim, as well as to strike the remedy sought by the Complaint. A copy of
 17 Respondent's Motion to Dismiss or to Strike is attached to this Application as Exhibit 8. On June 30,
 18 2011, the Administrative Law Judge denied Respondent's Motion to Dismiss in its entirety. A copy
 19 of the Administrative Law Judge's ruling is attached to this Application as Exhibit 9.

² As part of the remedy for the alleged unfair labor practices, the Acting General Counsel seeks an order requiring Respondent to have the Washington State-based bargaining units represented by Charging Party perform assembly work associated with the second line, utilizing supply lines maintained by those bargaining units in Respondent's Seattle, Washington, and Portland, Oregon, area facilities. The Acting General Counsel does not wish to prohibit Respondent from making non-discriminatory decision with respect to where work will be performed. (Exhibit 2 at 00234 through 00246).

1 Board Subpoena B-648186 and the ALJ's Rulings on its Enforceability

2 6. In order to procure additional relevant records and documents for possible use in
3 the administrative hearing before the Administrative Law Judge, Charging Party made a written
4 request for and received subpoena *duces tecum* B-648186 (the "Subpoena") from the Board.
5 (Exhibit 6 at 000004 through 000008). On May 24, 2011, a representative of Charging Party served
6 the Subpoena on Respondent. The Subpoena required and directed Respondent's custodian of
7 records to appear at 9:00 a.m. on June 14, 2011, or any adjourned or rescheduled date, to testify in
8 Board Case 19-CA-32431, and to bring with him or her and produce specified books, records,
9 correspondence, and documents. The Subpoena was issued under the authority of § 11(1) of the
10 Act, 29 U.S.C. § 161(1), and in the manner and form provided for in the Act and § 102.31 of the
11 Board's Rules, 29 C.F.R. § 102.31.

12 7. The Subpoena seeks records sought by the Acting General Counsel's subpoena
13 *duces tecum* and which are directly related to the allegations of the administrative Complaint,
14 including information related to Respondent's alleged coercive statements and threats, as well as
15 the factual bases for such statements, and information related to Respondent's decisions to place a
16 second line in South Carolina and to transfer a sourcing supply program for the second line to South
17 Carolina or to subcontractors. The Subpoena also seeks information related to Respondent's
18 affirmative defenses, including its contentions that its decision to place the second line in South
19 Carolina was motivated by "a number of varied factors," that it would have taken the same action
20 even absent its consideration of the impact of future strikes, and that the remedy sought would
21 present an undue hardship. (Exhibit 6 at 000004 through 000008).

22 8. The Subpoena was properly served upon Respondent by United States mail to
23 Respondent's corporate headquarters, and by certified mail and email to Respondent's Counsel,

1 William Kilberg, Esq., of the law firm Gibson, Dunn & Crutcher LLP, located at 1050 Connecticut
 2 Avenue, NW, Washington, DC 20036-5306 on May 24, 2011. (Exhibit 6 at 000010-000015).
 3 Service and receipt of the Subpoena complied with § 11(4) of the Act, 29 U.S.C. § 161(4), and §
 4 102.113 of the Board's Rules, [29 C.F.R. § 102.113].

5 9. Pursuant to § 11(1) of the Act, 29 U.S.C. § 161(1), and § 102.31(b) of the Board's
 6 Rules [29 C.F.R. § 102.31(b)], Respondent, through its Counsel, filed a timely petition to revoke the
 7 Subpoena, dated June 3, 2011. (Exhibit 10). Charging Party filed an opposition to Respondent's
 8 petition to revoke the Subpoena on June 13, 2011. (Exhibit 11). On various dates between June 23
 9 and July 14, 2011, the parties made oral arguments to the Administrative Law Judge concerning
 10 Respondent's claims that the Subpoena is overbroad, seeks information not relevant to the material
 11 factual issues in dispute, and is unduly burdensome. The Administrative Law Judge ruled that
 12 Respondent is required to produce documents responsive to the Subpoena, as he had earlier orally
 13 limited and narrowed the Subpoena on the record. (Exhibit 1 at 000168-000485, 000764-000806).

14 The ALJ's Protective Order

15 10. On July 25, 2011, Respondent filed in the administrative proceeding a motion for a
 16 protective order so as to place a limit on persons who could have access to what Respondent
 17 described as sensitive and confidential records, as well as portions of records that would otherwise
 18 be responsive to the Subpoena and produced by Respondent. (Exhibit 4 at 000193-000297). The
 19 parties thereafter negotiated for terms of such a protective order, but did not reach agreement.
 20 Following the Administrative Law Judge's solicitation of the parties' positions, the parties submitted
 21 briefs and made oral argument. (Exhibit 1 at 000813-000886; Exhibit 4 at 000298-000611). On
 22 August 12, 2011, the Administrative Law Judge issued a protective order (Exhibit 4 at 000837-
 23 000861). On August 22, 2011, upon a further motion of Respondent to clarify that order,

Administrative Law Judge Anderson issued an amended protective order (the "Protective Order").
(Exhibit 4 at 000612-000639, 000862-000880).

11. On August 22, 2011, Bloomberg, L.P., the operator of global news service Bloomberg News, filed a letter requesting modification of the Protective Order. After considering the request and written responses submitted by all parties, the Administrative Law Judge issued a written ruling declining to modify the Protective Order. (Exhibit 4 at 000640-000659, 000881-000893).

12. The Protective Order sets forth a protocol for resolution of Respondent's confidentiality claims. The Protective Order recognizes "Confidential Information" as that which:

contains, includes, or consists of confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Respondent maintains in confidence in the ordinary course of business and which, if disclosed, will cause specific financial and/or competitive harm to the Respondent.

(Exhibit 4 at 000868).

13. The Protective Order provides that, upon Respondent's designation and disclosure of such information, "Confidential Information" shall only be made available to Counsel for the Acting General Counsel, counsel for Charging Party, witnesses, individuals assisting counsel, courtroom personnel and adjudicative bodies, such as the Board.

(Exhibit 4 at 000869-000870, 000873). The Protective Order further provides that Respondent may designate additional heightened restrictions on Charging Party's access.

(Exhibit 4 at 000870-000871). The Protective Order also provides for a dispute resolution procedure whereby Counsel for the Acting General Counsel and counsel for Charging Party may challenge any of Respondent's designations, and allows for Respondent to make a good cause showing in support of those designations. (Exhibit 4 at 000872).

14. The Protective Order provides that if and when portions of documents designated by Respondent as "Confidential Information" are proffered as exhibits to be placed into the administrative record, that "Confidential Information" will be placed into the administrative record under provisional seal upon motion of any party, without any further findings by the Administrative Law Judge at that time. Such provisional seal may be made permanent upon motion by Respondent at the conclusion of the hearing. If, at the end of the hearing, the Administrative Law Judge rejects such a motion and decides to unseal an earlier provisionally sealed exhibit, filing, or transcript excerpt, any such material shall remain provisionally sealed pending resolution of further review of that decision. (Exhibit 4 at 000873-000874).

The Protective Order in Practice and the Administrative Law Judge's Rulings

15. On various dates between June 14 and October 7, 2011, Respondent provided Counsel for the Acting General Counsel and counsel for the Charging Party (a) copies of the subpoenaed documents it contends include confidential information, with all asserted "Confidential Information" redacted, and (b) redaction logs providing information about the bases for its redactions. Respondent thereafter submitted affidavits in support of its asserted bases for the redactions. (See Affidavits at Exhibit 4 at 000281-000285, 000803-000813, 000894-000992).

16. On October 20, 2011, Counsel for the Acting General Counsel and Counsel for the Charging Party agreed to treat *all information* Respondent had designated as "Confidential Information" as properly subject to the limitations regarding their use as provided in the Protective Order. The Administrative Law Judge then ordered that those documents be produced in unredacted form, subject to the confidentiality protections set forth in the Protective Order. (Exhibit 1 at 002024-002025). Respondent has not yet produced the information in unredacted form.

17. On various dates during the proceeding, Respondent sought the following *additional* restriction on the Charging Party's access to certain specified redacted portions of some of the redacted documents:

Redacted information shall not be viewed, shared, or otherwise communicated to Charging Party, or any employee, officer or representative of the IAM or its counsel. However, counsel for charging party who will not be participating in the 2012 collective bargaining negotiations between Charging Party and Respondent, will be permitted to view the restricted information.

(Exhibit 4 at 000733-000737). These documents are Bates numbered:

NLRB_004284	NLRB_007841	NLRB_009864
NLRB_004285	NLRB_007846	NLRB_009875
NLRB_004318	NLRB_007855	NLRB_009877
NLRB_004322	NLRB_007865	NLRB_009878
NLRB_004325	NLRB_007867	NLRB_009887
NLRB_004326	NLRB_007871	NLRB_009891
NLRB_004327	NLRB_007875	NLRB_009894
NLRB_007732	NLRB_007879	NLRB_009895
NLRB_007734	NLRB_007888	NLRB_009896
NLRB_007738	NLRB_007908	NLRB_009915
NLRB_007741	NLRB_007911	NLRB_009923
NLRB_007742	NLRB_007918	NLRB_009939
NLRB_007743	NLRB_007920	NLRB_009940
NLRB_007799	NLRB_007931	NLRB_010239
NLRB_007800	NLRB_007952	NLRB_010241
NLRB_007822	NLRB_009794	NLRB_010246
NLRB_007824	NLRB_009825	NLRB_010247
NLRB_007827	NLRB_009826	NLRB_010289
NLRB_007832	NLRB_009835	NLRB_010291
NLRB_007836	NLRB_009861	NLRB_010293
NLRB_007837	NLRB_009863	

18. On September 7 and 12, 2011, the parties submitted written arguments addressing the general factors to be considered by the Administrative Law Judge when considering Respondent's requested heightened restriction on the Charging Party's access to documents (described immediately above). On various dates between September 14 and October 19, 2011, the parties submitted to the Administrative Law Judge disputes concerning Respondent's claims that

1 the Charging Party's access to particular information in the subpoenaed documents should be
2 restricted. (Exhibit 1 at 001277-001321, 001394-001407, 001455-001724, 001978-001994).

3 19. After conducting an *in camera* inspection of unredacted versions of the documents
4 at issue for which Respondent requested heightened Charging Party use restriction, the
5 Administrative Law Judge ruled that Charging Party's access to those portions of the documents
6 should not be so restricted, and ordered Respondent to produce them in unredacted form. (Exhibit 1
7 at 001277-001321, 001394-001407, 001455-001724, 001978-001994).

8 Respondent's Assertion of the "*Berbiglia*" Privilege³

9 20. On October 14 and 18, 2011, Respondent moved the Administrative Law Judge to
10 find that portions of certain documents responsive to the Subpoena may be withheld from any
11 disclosure based on a qualified labor-relations strategy privilege recognized by the Board, and
12 engaged in oral argument as to whether certain information was so privileged. (Exhibit 1 at 001728-
13 001844). After conducting an *in camera* inspection of the allegedly privileged portions of the
14 subpoenaed documents, the Administrative Law Judge ruled orally on the record that certain
15 information contained in the documents did not constitute privileged labor strategy, and ordered
16 Respondent to produce that information in unredacted form. (To the extent such documents were
17 designated "Confidential Information" by Respondent, they would retain the protections of the
18 Protective Order.) The information the Administrative Law Judge ruled was not privileged as
19 information directly related to labor-relations strategy is identified by the following Bates numbers:

20 NLRB_009768

21 NLRB_009773 (except for a portion of the fourth line of the redacted paragraph)

22 NLRB_009941

23 NLRB_009942

24 NLRB_009943

³ *Berbiglia, Inc.*, 233 NLRB 1476 (1977).
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1 NLRB_009945

2 NLRB_009773

3 NLRB_009946

4 (Exhibit 1 at 001728-001843). Respondent has not yet produced any of these documents in
5 unredacted form.

6 21. Respondent's records that the Administrative Law Judge ruled are privileged labor
7 relations strategy and, therefore, *may be withheld* are not sought in this proceeding and,
8 accordingly, are not in issue.

9 Respondent's Partial Compliance with the Subpoena

10 22. Respondent has represented to the Administrative Law Judge that it is producing
11 substantially all subpoenaed documents, but that it has redacted from those documents all
12 information that, it contends, requires either confidential treatment or heightened restrictions on
13 access by Charging Party, and all information that it contends is privileged from disclosure under the
14 Board's labor-relations strategy privilege. (Exhibit 1 at 000966-001045).

15 23. Respondent has further represented that it will continue to refuse to comply with
16 Administrative Law Judge Anderson's order to produce unredacted the "Confidential Information"
17 until a federal district court issues a protective order in proceedings to enforce the Subpoena under
18 § 11(2) of the Act, 29 U.S.C. § 161(2). (Exhibit 1 at 002016-002017). Respondent has also stated
19 that it may seek review of Administrative Law Judge Anderson's rulings (a) rejecting Respondent's
20 requested heightened restrictions on the Charging Party's access to portions of certain documents
21 and (b) rejecting Respondent's claims that portions of certain documents are completely privileged
22 from disclosure under the Board's labor-relations strategy privilege. (Exhibit 1 at 001754, 002016-
23 002017).

24 24. Respondent's refusal to produce such documents material to the litigated issues in

1 the administrative proceedings before Administrative Law Judge Anderson constitutes contumacious
2 conduct within the meaning of § 11(2) of the Act, 29 U.S.C. § 161(2), which conduct is impeding the
3 administrative unfair labor practice proceeding described above in paragraph 3, and preventing the
4 Board from carrying out its duties and functions under the Act.

5 **WHEREFORE**, the National Labor Relations Board respectfully prays:

6 1. That an order to show cause issue directing Respondent to appear before this Court
7 on a date specified and show cause why an order should not issue (a) directing its custodian of
8 records to appear before the Administrative Law Judge for Board Case 19-CA-32431 at such time
9 and place as the Administrative Law Judge may designate and to produce unredacted the
10 subpoenaed documents that so far have been produced in redacted form, to give testimony, and to
11 answer all questions relevant to the maintenance and production of these records at the Board's
12 unfair labor practice hearing, and (b) affirming and ordering compliance with the Protective Order
13 issued by the Administrative Law Judge;

14 2. That upon the return of said order to show cause, this Court issue an order requiring
15 Respondent's custodian of records to appear before the Administrative Law Judge, at a time and
16 place to be fixed by the Administrative Law Judge, and to produce unredacted the subpoenaed
17 documents, to give testimony, and to answer all questions relevant to the maintenance and
18 production of records at the Board's unfair labor practice hearing, affirming and ordering all parties to
19 comply with the Protective Order issued by the Administrative Law Judge; and

1 3. That the Applicant, National Labor Relations Board, be granted such other and
2 further relief as may be necessary and appropriate.

3 DATED AT Seattle, Washington this 22nd day of November, 2011.

4 Respectfully Submitted,

5
6
7 By: /s/ Anne P. Pomerantz
8 /s/ Mara-Louise Anzalone
9 /s/ Peter G. Finch
10 /s/ Rachel Harvey
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